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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**
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13 KEITH DARRELL KADO,

14 Plaintiff,

15 vs.

16 PERFORMANCE CONTRACTING, INC. et
17 al.,

18
19 Defendant.
20

CASE NO. 11-CV-1602 JLS (MDD)

**ORDER: (1) DENYING MOTION
TO PROCEED IFP; (2) DENYING
MOTION TO APPOINT
COUNSEL; AND (3) DIRECTING
SERVICE OF FIRST AMENDED
COMPLAINT**

21 On August 19, 2011, the Court granted Plaintiff Keith Darrell Kado's motion to proceed *in*
22 *forma pauperis* ("IFP"), denied his motion to appoint counsel, and sua sponte dismissed his Complaint
23 under 28 U.S.C. § 1915(e)(2). (ECF No. 4.) Plaintiff subsequently filed a First Amended Complaint
24 ("FAC") (ECF No. 5) as well as another motion to proceed IFP (ECF No. 6) and motion to appoint
25 counsel (ECF No. 7).

26 **SUA SPONTE SCREENING**

27 Notwithstanding IFP status, the Court must subject each civil action commenced pursuant
28 to 28 U.S.C. § 1915(a) to mandatory screening and shall order the sua sponte dismissal of any case

1 it finds “is frivolous or malicious,” “fails to state a claim on which relief may be granted,” or
 2 “seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C.
 3 § 1915(e)(2)(B); *see also Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc) (noting
 4 that 28 U.S.C. § 1915(e) “not only permits but requires” the court to sua sponte dismiss an IFP
 5 complaint that fails to state a claim).

6 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua sponte
 7 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130. However, as
 8 amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an action filed pursuant to
 9 the IFP provisions of § 1915 make and rule on its own motion to dismiss before directing the
 10 U.S. Marshal to effect service pursuant to Federal Rule of Civil Procedure 4(c)(3). *See id.* at
 11 1127; *Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001).

12 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 13 allegations of material fact and must construe those facts in the light most favorable to the
 14 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also Andrews v. King*, 398
 15 F.3d 1113, 1121 (9th Cir. 2005); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
 16 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In
 17 addition, the Court has a duty to liberally construe a pro se plaintiff’s pleadings, *see*
 18 *Karim-Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988), which is “particularly
 19 important in civil rights cases,” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). In giving
 20 liberal interpretation to a pro se litigant’s complaint, however, the court may not “supply essential
 21 elements of the claim that were not initially pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*,
 22 673 F.2d 266, 268 (9th Cir. 1982).

23 Having conducted an initial screen of the FAC, construing it liberally, the Court finds that
 24 Plaintiff’s claims are sufficiently pleaded to survive the sua sponte screening requirement of 28
 25 U.S.C. § 1915(e)(2). Accordingly, Plaintiff is entitled to U.S. Marshal service on his behalf. *See*
 26 *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc); 28 U.S.C. § 1915(d) (“The
 27 officers of the court shall issue and serve all process, and perform all duties in [IFP] cases.”); Fed.
 28 R. Civ. P. 4(c)(3) (courts must “order that service be made by a United States marshal or deputy

1 marshal . . . if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915.”).
 2 Plaintiff is cautioned, however, that “the sua sponte screening and dismissal procedure is
 3 cumulative of, not a substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may
 4 choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

5 MOTION TO APPOINT COUNSEL

6 As stated in the Court’s previous Order denying Plaintiff’s motion to appoint counsel,
 7 “[t]here is no constitutional right to appointed counsel for employment discrimination claims.”
 8 *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982). In actions brought
 9 under Title VII, the Court may appoint counsel “in such circumstances as the court may deem
 10 just.” 42 U.S.C. § 2000e-5(f)(1). Three factors are relevant: “(1) the plaintiff’s financial
 11 resources; (2) the efforts made by the plaintiff to secure counsel on his own; and (3) the
 12 meritoriousness of plaintiff’s claims.” *Ivey*, 673 F.2d at 269. In his prior motion to appoint
 13 counsel, Plaintiff had not shown any effort to secure counsel on his own. He now submits letters
 14 documenting three failed attempts to secure counsel on his behalf. (*See* FAC 2-4.) There is also
 15 no dispute that Plaintiff lacks sufficient financial resources to hire counsel because he is
 16 proceeding IFP in this action. However, the Court cannot conclude based on the evidence before it
 17 that Plaintiff’s claims are sufficiently meritorious to require appointment of counsel. Accordingly,
 18 the Court again concludes that the circumstances do not warrant appointment of counsel at this
 19 time, and **DENIES** Plaintiff’s motion without prejudice.

20 CONCLUSION

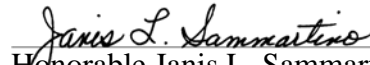
21 Plaintiff’s motion to proceed IFP is **DENIED AS MOOT**, the Court having already
 22 granted Plaintiff IFP status. For reasons stated above, the Court directs service of Plaintiff’s FAC.
 23 The Clerk shall issue a summons as to Plaintiff’s FAC upon Defendants and shall forward it to
 24 Plaintiff along with a blank U.S. Marshal Form 285. In addition, the Clerk shall provide Plaintiff
 25 with a certified copy of this Order and a certified copy of the FAC and the summons. Upon receipt
 26 of this “IFP Package,” Plaintiff is directed to complete the forms as completely and accurately as
 27 possible, and to return them to the U.S. Marshal according to the instructions provided by the
 28 Clerk in the letter accompanying his IFP package. Upon receipt, the U.S. Marshal shall serve a

1 copy of the FAC and summons upon Defendants as directed by Plaintiff on the forms. All costs of
2 service shall be advanced by the United States. *See* 28 U.S.C. § 1915(d); Fed. R. Civ. P. 4(c)(3).

3 Defendants shall reply to the complaint within the time provided by the applicable
4 provisions of Federal Rule of Civil Procedure 12(a). Plaintiff shall serve upon Defendants or, if
5 appearance has been entered by counsel, upon Defendants' counsel, a copy of every further
6 pleading or other document submitted for consideration of the Court. Plaintiff shall include with
7 the original paper to be filed with the Clerk of the Court a certificate stating the manner in which a
8 true and correct copy of any document was served on the Defendants or counsel of Defendants and
9 the date of service. Any paper received by a district judge or magistrate judge which has not been
10 filed with the Clerk or which fails to include a Certificate of Service may be disregarded.

11 **IT IS SO ORDERED.**

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13 DATED: May 10, 2012

14 
15 Honorable Janis L. Sammartino
16 United States District Judge
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